

**DONALD A. LANDRY**  
Claimant

**GRAPHIC TECHNOLOGY, INC.**  
Respondent

**ITT HARTFORD INSURANCE**  
Insurance Carrier

[illegible]

## ORDER

## APPEARANCES

## RECORD

## ISSUES

On September 30, 1997, the Appeals Board awarded claimant \$17,339.94 in benefits for an injury to the left hand. Claimant appealed that Order to the Court of Appeals where it is currently pending. Claimant now asks the Appeals Board to award him

penalties, interest, and attorney fees under K.S.A. 44-512a and 44-512b for the nonpayment of benefits.

The issues on this appeal are:

- (1) Is claimant entitled to penalties, interest, and attorney fees?
- (2) If so, in what amounts?

Claimant contends he should receive interest on the sum of \$9,291 commencing May 31, 1996, when the company's physician rated him and found that he had a 19 percent functional impairment to the left upper extremity. Claimant contends that respondent knew as of that date that he would be entitled to receive a minimum of \$9,291 in permanent partial disability benefits. From the date of the Board's Order on September 30, 1997, claimant requests interest on the amount the Board awarded, \$17,339.94.

Because respondent did not appeal the Board's order, claimant contends that the respondent is obligated to pay no less than the \$17,339.94 that the Appeals Board awarded. And that respondent must pay that amount now because an employer does not have a right to stay payment of an award when the employee appeals.

In addition, claimant requests \$100 per week in penalties for each week following September 30, 1997, until the Appeals Board's award is paid, along with attorney fees in the sum of \$6,400, which represents 40 hours of legal work at \$160 per hour.

Respondent, on the other hand, contends that the permanent partial disability benefits are stayed because the award is on appeal to the Court of Appeals and it is therefore, not final. Also, respondent contends the only permanent partial disability benefits that are payable while a case is pending before the Court of Appeals are those benefits that accrue following the Appeals Board's decision, plus the 10-week period immediately before the Board's order.

#### **FINDINGS OF FACT**

After reviewing the record, the Appeals Board finds:

- (1) This is the second time this proceeding has been appealed to the Appeals Board. The first time the parties requested review of the Award dated March 11, 1997, entered by Judge Foerschler.
- (2) By Order dated September 30, 1997, the Appeals Board found Donald A. Landry had sustained a 30 percent permanent partial impairment to his left hand as the result of a July 6, 1995, work-related accident. The Board awarded Mr. Landry 5.27 weeks of

temporary total disability benefits and 47.92 weeks of permanent partial disability benefits for a total award of \$17,339.94. Because all the weeks of disability compensation had accrued before the end of 1996, the entire award was due and owing before the Judge and the Appeals Board entered their decisions.

(3) Mr. Landry appealed the Appeals Board's Order to the Court of Appeals where the proceeding is currently pending.

(4) On December 9, 1997, Mr. Landry filed an application with the Division of Workers Compensation to request penalties, interest, and attorney fees under K.S.A. 44-512a and 44-512b for the nonpayment of benefits. By Order dated March 10, 1998, Judge Foerschler denied Mr. Landry's requests, which resulted in this appeal.

#### CONCLUSIONS OF LAW

The order denying penalties, interest, and fees should be affirmed.

(1) When awards are appealed from an Administrative Law Judge to the Appeals Board, the Board has 30 days from the date of argument to issue its decision. If the Board fails to render its decision within that 30 day period, the employer must begin paying the weekly disability compensation that the Administrative Law Judge awarded that accrues beginning the 31st day following argument. But any disability compensation that accrued before that 31st day is stayed. K.S.A. 1997 Supp. 44-551(b) provides in pertinent part:

(2) (A) . . . The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

(B) If an order on review is not issued by the board within the applicable time period prescribed by subsection (b)(1), medical compensation and any disability compensation as provided in the award of the administrative law judge shall be paid commencing with the first day after such time period and shall continue to be paid until the order of the board is issued, **except that no payments shall be made under this provision for any period before the first day after such time period.** Nothing in this section shall be construed to limit or restrict any other remedies available to any party to a claim under any other statute. [Emphasis added.]

(2) If the Appeals Board's decision is then appealed to the Court of Appeals, the employer must begin paying the weekly disability compensation that accrues after the effective date of the Appeals Board's decision, plus the weekly benefits that accrued during the 10-week period immediately before the Board's decision. K.S.A. 1997 Supp. 44-556(b) provides:

Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.

(3) Because all of the weeks of disability compensation had accrued before the effective dates of the Judge's Award and more than 10 weeks before the Board's decision, there are no weekly disability compensation benefits due and payable to Mr. Landry until the Court of Appeals renders its decision. Had this been an appeal before K.S.A. 44-556 was amended in 1993, the result would be significantly different. Before the 1993 amendment, compensation awarded by a district court was not stayed pending appellate court review.

(4) Because the disability compensation due Mr. Landry is stayed under K.S.A. 1997 Supp. 44-556(b) until the Court of Appeals renders its decision, that compensation is not due as required by the penalty statute, K.S.A. 44-512a. Mr. Landry's argument that the stay only applies when an employer appeals is neither supported by statutory language nor by any case law of which the Appeals Board is aware.

(5) Mr. Landry's request for interest under K.S.A. 44-512b should also be denied. That statute provides in pertinent part:

Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. . . .

Here, Mr. Landry claims compensation for 150 weeks, plus a healing period. The parties could not agree upon the extent of Mr. Landry's functional impairment. Due to the legal issues involved, Graphic Technology, Inc. had, and continues to have, just cause for refusing to pay the total compensation claimed. Further, the Appeals Board does not interpret this statute to require interest payments on minimum amounts of disability compensation that may ultimately be paid when the extent of functional impairment is the issue on appeal.

(6) Mr. Landry has also requested an award of attorney fees under K.S.A. 44-512a, which provides in part:

The employee may maintain an action in the district court of the county where the cause of action arose for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section and reasonable attorney fees incurred in connection with the action.

Because this proceeding is not a district court action, the request for attorney fees under K.S.A. 44-512a must be denied. Further, although Mr. Landry did not argue that he was entitled to attorney fees under K.S.A. 44-536(g), such a request would also be denied under these circumstances where the benefits being sought are not payable during the appeal, as opposed to those benefits that are payable during an appeal, as provided by K.S.A. 1997 Supp. 44-556(b).

**AWARD**

**WHEREFORE**, the Appeals Board affirms the Preliminary Decision dated March 10, 1998, entered by Administrative Law Judge Robert H. Foerschler.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David J. DeSimone, Kansas City, MO  
Brad I. Pearson, Kansas City, MO  
Daniel L. Doyle, Kansas City, MO  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director